87-1342

No. ——

Supreme Court, U.S.
FILED
FEB 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FREEMAN PAWNEE, WILLIAM L. PAWNEE, JR., MICHAEL J. PAWNEE, GREGORY PAWNEE, LISA J. PAWNEE, MURIEL LITTLECALF, EVELYN STANTON GARDNER, Individually, and on behalf of all others similarly situated,

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

HARVEY L. HARMON, SR.
(Counsel of Record)
KORNFELD, FRANKLIN & PHILLIPS
301 N.W. 63rd Street
Suite 600
Oklahoma City, OK 73116
(405) 840-2731
Attorney for Petitioners

February 5, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Where an appellate court decides that the United States owes fiduciary obligations to restricted Indians in the management and sale of their natural gas resources, does a complaint, which alleges a breach of fiduciary duties by the failure to obtain market value for the gas sold, state a claim upon which relief can be granted, without the further requirement that the complaint must also allege the breach of a specific statute or regulation?

2. May an appellate federal court, when called upon to decide solely a question of whether a fiduciary obligation existed, appropriately inject a pleading question and dismiss a case on the merits on the grounds the complaint fails to state a claim upon which relief can be granted?

3. Where the United States Claims Court did not pass upon the issue of whether a complaint stated a claim upon which relief could be granted, can the United States Court of Appeals for the Federal Circuit appropriately dismiss the case upon that ground, without granting appellants' (who successfully reversed the Claims Court on the sole question appealed) request for leave to amend the complaint?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	4
I. NATURAL GAS PRICES AND LESSEE'S LONG TERM SALES CONTRACT	4
II. PETITIONER'S CLAIM AND COMPLAINT	6
REASON FOR GRANTING THE WRIT	10
I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *Mitchell v. United States* (*Mitchell II*) AND OTHER CONTROLLING DECISIONS	11
II. ALTERNATIVELY, IT IS AN ABUSE OF DISCRETION TO DENY A REQUEST TO AMEND A COMPLAINT WHEN AN ORDER IS ENTERED THAT THE COMPLAINT DOES NOT STATE A CLAIM	13
CONCLUSION	15
APPENDIX	

TABLE OF AUTHORITIES

Cases: Page

Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390 (Ct. Cl. 1975) 9, 12
Conley v. Gibson, 335 U.S. 41, 78 S. Ct. 99 (1957) .. 13
Duncan v. Andrews, Nos. C-71-1572 & C-71-1713, memo op., at pgs. 7-10 (N.D. Cal. March 22, 1977) 7
Duncan v. United States (Duncan I), 597 F.2d 1337 (Ct. Cl. 1979) 7
Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227 at p. 230 (1962) 14
Hallam v. Commerce Mining Royalty Co., 49 F.2d 103 (10th Cir. 1931) *cert. den.*, 284 U.S. 643 (1931) 14
Light Cap v. Mobile Oil Co., 562 P.2d 1, (Kansas 1977), *cert. den.* 434 U.S. 876 (1977) 11
Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973) 12
Montana Power Co. v. Kravik, 586 P.2d 298 (Wyo. 1978) 11
Piney Woods Country Life Sch. v. Shell Oil Co., 539 F. Supp. 957 (S.D. Miss. 1982) 11
Tara Pet. Corp. v. Hughey, 630 P.2d 1269 (Okl. 1981) 11
Texas Oil & Gas Corp. v. Vela, 429 S.W.2d 866 (Tx. 1968) 11
United States v. Mitchell (Mitchell II), 463 U.S. 206, 103 S.Ct. 2961 (1983) 6, 10, 11, 12, 13

Statutes:

25 U.S.C. § 396 2
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1404(c) 6
28 U.S.C. § 2501 10

Regulations:

25 C.F.R. § 212.16 ..... 3, 8, 9
30 C.F.R. § 206.103 ..... 3, 9

Books:

Webster's Third New International Dictionary (1961) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. ———

FREEMAN PAWNEE, WILLIAM L. PAWNEE, JR., MICHAEL J. PAWNEE, GREGORY PAWNEE, LISA J. PAWNEE, MURIEL LITTLECALF, EVELYN STANTON GARDNER, Individually, and on behalf of all others similarly situated,

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

OPINIONS AND ORDERS BELOW

The November 25, 1987, unreported Order of the United States Court of Appeals for the Federal Circuit ("Circuit Court") denying rehearing in banc appears at Appendix 11a. The November 10, 1987 unreported Order of the Circuit Court denying rehearing appears at Appendix 12a. The Judgment of the Circuit Court appears at Appendix 13a. The opinion of the Circuit Court is reported at 830 F.2d 187 and appears at Appendix 1a to 10a. The November 4, 1986, unreported Judgment of the United States Claims Court ("Claims Court") appears at Appendix 14a and its October 31, 1986, unreported Memorandum Order at Appendix 15a to 23a. The January 16, 1985, unreported (transfer) Order of the

United States District Court for the Western District of Oklahoma appears at Appendix 24a to 27a.

JURISDICTION

The opinion of the Circuit Court was entered on September 28, 1987. Timely application for rehearing was denied by the Circuit Court on November 10, 1987, and rehearing in banc was denied on November 25, 1987.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The seminal statute relating to the fiduciary management by the United States of the oil and gas assets of restricted Indians' allotted lands is 25 U.S.C. § 396. Section 396 was first enacted by the Act of March 3, 1909, Ch. 263, 35 Stat. 783. It was amended August 9, 1955.

25 U.S.C. § 396 provides:

> "§ 396. Leases of allotted lands for mining purposes
>
> All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years *as may be deemed advisable by the Secretary* of the Interior; and the Secretary of the Interior is *authorized to perform any and all acts* and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect: Provided, That if the said allottee is deceased and the heirs to or devisees of any interest in the allotment have not been determined or, if determined, some or all of them cannot be located, the Secretary of the Interior may offer for sale leases for mining purposes to the highest responsible qualified bidder, at public auction, or on sealed bids, after notice and advertisement, upon such terms and conditions as the Secre-

> tary of the Interior may prescribe. The Secretary of the Interior shall have the right to reject all bids whenever in his judgment *the interests of the Indians will be served* by so doing, and to re-advertise such lease for sale." [1]

While there are some hundred or more paragraphs of detailed regulations dealing with all facets of the management of the natural gas (and oil) assets of restricted Indians, the regulation in effect when this action was filed, and upon which the action is principally focused is 25 C.F.R. § 212.16. In pertinent part it provides:

> ". . . 'value' for the purposes of the lease may, *in the discretion* of the Secretary, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the oil and gas supervisor. The actual *amount realized* by the lessee from the sale of said products *may, in the discretion* of the Secretary of the Interior, be *deemed mere evidence* of or conclusive evidence of such value . . . ."

25 C.F.R. § 212.16 is incorporated in the Department of Interior oil and gas lease form for individually allotted restricted Indian lands.

30 C.F.R. § 206.103 provides, *inter alia*:

> "The *value* of production for the purpose of computing [gas] royalty shall be the estimated *reasonable value* as determined by the Associate Director *due consideration* being given to the *highest price* paid

---

[1] All emphasis herein is supplied unless otherwise indicated. Petitioners will be referred to as: "Petitioners" or as "Pawnee-Plaintiffs".

> or offered *for a part or* for a majority of production . . . *and to other relevant matters* . . . under no circumstances shall the value of production of any of said substances [oil and gas] for the purpose of computing royalty be deemed less than the gross proceeds accruing the lessee [well operator] from the [re]sale thereof or less than the value as computed on such *reasonable unit value* as shall have been determined by the Secretary . . . ."

STATEMENT OF THE CASE

I. NATURAL GAS PRICES AND LESSEE'S LONG TERM SALES CONTRACT.

Up until the mid-1970's the market price of natural gas in Oklahoma and other gas producing States remained relatively stable over long periods of time, i.e., 10 to 20 years. After 1975 the price of natural gas in the field commenced increasing and soon rapidly escalated to many times its former price.

Because of the investment necessary in building pipelines to gather and transport natural gas, gas is resold by the well operator (lessee) on long-term contracts, i.e., 10 to 20 years.

These contracts are entered into between the well operators (lessees)—who buy the gas from the Indian lessors under the terms of the Department of Interior leases—and who resell such gas to pipeline or other gas purchasers. Neither the United States nor the Indian lessor have any thing to say about the operator's resale contract or the resale price provisions, and in fact, may not even know who the purchaser is.

Such contracts customarily provided for a fixed price over the length of the contract term. When prices were stable, the fixed long-term contract price was essentially equivalent to the market value of the gas as it was produced and sold.

However, as prices increased, and then escalated in the field, fixed contract prices soon represented only a small fraction of the market value of the gas. Unless the resale contract contained a provision for redetermining price, based upon market value, the dramatic disparity between the contract price and true market value of the gas would continue until the contract expired by its own terms, and a new contract based on the-then actual market value was entered into.

For example, the United States was, and for some time had been, collecting 16⅔ percent (royalty rate) of 26 cents per MCF, which was the Pawnee Plaintiffs' lessees' long term resale contract price. This amounted to a sales price (royalty) of 4.2 cents for each MCF of the Pawnee Plaintiffs' gas when the gas purchase contract expired by its own terms on June 7, 1984.

The new gas contract with the same resale purchaser, effective the very next day, set a price of $1.50 per MCF, so that the money collected by the United States for the sale of the gas for the benefit of the Pawnee heirs of White Buffalo (the original Indian lessor), jumped from 4.2 cents per MCF on June 7, 1984, to 24.5 cents on June 8, 1984 (16⅔ percent of $1.50).

If the gas contract had had a longer term or had been entered into a later date, the United States would still be collecting 4.2 cents for each MCF of the Pawnee's gas.[2]

The example given above, demonstrating the difference between what the United States was, and is, collecting as the gas is being sold for the benefit of restricted Indians having allotted lands in Oklahoma by equating "proceeds received" by the well operator with "market value" of

---

[2] It is well-known recent history that gas prices in the field rapidly escalated from about 1975 to 1982. In 1982, the "gas bubble" collapsed. Gas (as well as oil) prices started their dramatic spiral downward. However, gas prices have never returned to their "pre-boom" levels of 25 and 26 cents.

the gas is, and has been for several years, true in varying degrees for the estimated 4,500 restricted Indians having beneficial ownership of natural gas being produced in Oklahoma.[3]

To paraphrase the controlling principle of *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206, 103 S.Ct 2961 (1983):

> "In harvesting the Indians natural gas, the United States has the absolute unavoidable duty to see to it that the Indian receives fair market value when his asset is sold."

And further this Court held:

> ". . . It would be anomalous to conclude that these enactments [regulations] create a right to the [market] value of certain resources when the Secretary lives up to his duties, but no right to the [market] value of the resources if the Secretary's duties are not performed. . . ." (103 S.Ct. at p. 2973)

II. PETITIONERS' CLAIM AND COMPLAINT

The original Complaint was filed September 12, 1983, in the United States District Court for the Western District of Oklahoma. In the First Cause of Action, the Complaint sought a declaratory judgment, an accounting and other non-monetary relief. The Second Cause of Action sought monetary damages against the United States for breaches of fiduciary obligations. Petitioners conceded that because the Second Cause of Action sought damages in excess of $10,000.00, the action was subject to transfer under 28 U.S.C. § 1404(c) to the Claims Court. In the District Court, Petitioners unsuccessfully contended that the transfer should not occur until *after*

[3] The United States knows the exact number, percent of royalty ownership, name and address of each restricted Indian for whom it collects gas royalty, because it mails a government check to them each month.

that Court had decided the First Cause of Action claims for non-monetary relief.[4]

The original District Court Complaint alleged that the United States was, and had been, breaching its fiduciary duties by failure to:

> ". . . insure that the plaintiffs receive from production . . . the highest present price paid or offered for gas sold from the field at the time of production in the area." (Orig. Complaint, para. V, p. 2.)
>
> * * * *
>
> "* * * to affirmatively act for the benefit of plaintiffs to raise and commence collecting the *present market value* of gas, being offered and sold from the property of the plaintiffs equal to the highest price paid or offered for sale where the leased lands are situated, * * *" (Orig. Complaint, para. VII, p. 3.)

The original Complaint also defined a class of restricted Indians:

> "* * * whose mineral interests within the State of Oklahoma have been leased, and who are receiving less than *present market value* for their gas under leases consented to and approved by the Secretary of the Interior * * *" (Orig. Complaint, First Cause of Action, para. VIII, p. 3.)

Further, in setting out the measure of damages, that Complaint stated:

> "* * * That the damage is the difference in the amount actually received by the plaintiffs and the amount of *market price* at the time of production of

---

[4] This contention was based upon the precedent established in *Duncan v. Andrews*, Nos. C-71-1572 and C-71-1713, memo op. at 7-10 (N.D. Cal. March 22, 1977) as recognized by the Court of Claims in *Duncan v. United States* (*Duncan I*) 597 F.2d 1337 (1979) (*See* particularly 597 F.2d at p. 1343.) The case at bar however was transferred on January 16, 1985, before the District Court decided the First Cause of Action Claims for non-monetary relief.

> the gas produced and sold from the plaintiffs' lease. * * *" (Orig. Complaint, Second Cause of Action, para. I, p. 5.)
>
> * * * *
>
> "* * * judgment in an amount to be determined by the Court equal to the difference in the amount of money actually paid to plaintiffs and the amount which should have been paid under defendants' proper discharge of their fiduciary responsibilities." (Orig. Complaint, Second Cause of Action, para. III, p. 5.)[5]

The original District Court Plaintiffs are the heirs of White Buffalo, the restricted Indian lessor. A Second Amended Complaint was filed in the Claims Court adding an additional plaintiff, who is the sole heir of Earnest and Red Bird Stanton, the original restricted Indian lessors.

The Second Amended Complaint, which the Circuit Court held did not state a claim upon which relief could be granted, alleged, *inter alia*, that the United States owe(s):

> "* * * a fiduciary obligation and duty to plaintiffs under the referenced statutes, case law and regulations * * * to insure that the Secretary of the Interior or his designee collect for plaintiffs' exclusive benefit gas royalties computed on the basis of the *market value* of the gas at the time of its production." (Second Amended Complaint, First Cause of Action, para. VIII, p. 3.)

Petitioners, in their Petition for Rehearing to the Circuit Court, succintly stated the matter:

> "It is Appellants' position that the regulation [25 C.F.R. 212.16] (and the leases) *give the Secretary*

---

[5] Originally the Secretary of the Interior and the United States were named defendants. The Secretary was not named as a defendant when an Amended Complaint was filed in the Claims Court.

discretion to determine value, which has to mean 'fair market value'."

The Secretary also suggests at least two ways to determine value.

One was a so-called "major portion" analysis which according to the Government, proved to be impossible to perform and unworkable.[6] The other converts a "market value lease" to a "proceeds received lease," a totally appropriate yardstick for oil (monthly changing market prices), but totally inappropriate for gas, which has been resold under a resale contract for a fixed price for a long term.

If under the regulation [25 C.F.R. § 212.16], the Secretary has discretion whether to determine fair market value at the time the gas is sold, or accept a substantially less "value" based upon resale proceeds received by the lessee, he has abused his discretion by accepting the least possible income for the Indian. [citing and quoting 30 C.F.R. § 206.103.]

If on the other hand, as the [court's] Opinion now holds, the Secretary, by his own regulation, has confined his right to determine "value" to the lowest possible amount, the Secretary has plainly breached his duty as a trustee by failing to use the tools Congress provided in order to earn the best available income on the sale of the Indians' gas. *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390 (Ct.Cl. 1975) (Emphasis in the original.)

---

[6] The Government filed the Declaration of Robert E. Boldt, Associate Director for Royalty Management, Minerals Management Service, (MMS) Department of the Interior, in the Claims Court which describes the "major portion analysis" process. That Declaration states that the difficulties of such an analysis "will produce at best an inaccurate determination, [and the described difficulties], make it *impossible* for MMS *to use a major portion analysis.*"

REASON FOR GRANTING THE WRIT

The decision below deprives Petitioners' and all restricted Indians similarly situated from attaining the stated goal of Congress that Indians "were to be given 'their fair day in court so they can call the various Government agencies to account on the obligations that the Federal Government assumed' " *Mitchell II*, 403 U.S. at p. 214, 103 S.Ct. at pp. 2966-67.

Because this action was filed on September 12, 1983, more than four (4) years ago, all claims for the Indians' gas sold for less than market value before September 12, 1977, would likely have been barred by limitations. 28 U.S.C. § 2501.

If the dismissal by the Circuit Court on technical pleading grounds is allowed to stand, requiring a new action to be filed in 1988 by Petitioners, alleging violations of one or more specific regulations, likely, damages for viable claims for gas sales for less than market value before 1982 will be barred. This, despite the fact the suit has always stated that the wrong complained of, was the Secretary's failure to obtain market value for the Indians' gas.

Moreover, Indians having the beneficial ownership of natural gas produced from allotted lands in Oklahoma (and other States) will be receiving substantially, and often dramatically, less royalty payments than those with gas production in Kansas, Texas, Wyoming, Mississippi and other States.

This results because Oklahoma (and some States) have adopted the rule that the "value" of lessor's gas is determined by the fixed resale price in the lessees long term resale contract. Kansas (and other States) have adopted the rule that the "value" of lessor's gas is determined, not by the fixed resale price, but by its *true market value* as it is severed from the soil (produced) and sold to the lessee. (For example, *see*: *Tara Pet.*

Corp. v. Hughey, 630 P.2d 1269 (Okl. 1981); *Texas Oil & Gas Corp. v. Vela*, 429 S.W.2d 866 (Tx. 1968); *Light Cap v. Mobile Oil Co.*, 562 P.2d 1 (Kansas 1977) *cert. den.* 434 U.S. 876 (1977); *Montana Power Co. v. Kravik*, 586 P.2d 298 (Wyo. 1978); and *Piney Woods Country Life Sch. v. Shell*, 539 F.Supp. 957 (S.D. Miss. 1982).

Surely under a national policy of Indian trusteeship administered by the Secretary of Interior, it was never intended that restricted Indians in some states would receive true market value upon the sale of their natural gas, while those in other states (including Oklahoma) would receive far less than market value.

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *MITCHELL v. UNITED STATES (MITCHELL II)* AND OTHER CONTROLLING DECISIONS.

Petitioners' Complaint alleged the Government was allowing and approving the sale of the Indians' gas for less than its market value. This, it was alleged, constituted a breach of the Governments' fiduciary obligations.

In *Mitchell II*, 463 U.S. 206 (1983), this Court unqualifiedly held that the Government was liable for monetary damages if the restricted Indians could prove that the Government allowed their timber to be sold for less than market value. Such conduct was held to be a breach of the Governments' fiduciary obligations to the Indians.

Mitchell II makes no reference to, nor have we been able to find, any timber statute or regulation which prohibits the sale of the Indians' timber for less than market value. Nor did the Mitchell Complaint allege a violation of a specific statute or regulation. Yet the court below dismissed Petitioners' case on the sole grounds that the Complaint did not state a claim upon which relief

could be granted because it did not allege a breach of a specific statute or regulation. (Appendix 9a-10a.)[7]

To be sure, Petitioners pled more than they should have, or was necessary. Petitioners', in addition to pleading gas sales below market value, also pled that the Government should have been collecting gas royalties "based upon market value determined by the average of the three highest prices at the time of, and in the county where it was produced". (Appendix 8a.)

How the Government should have determined market value of the Indians' gas during the relevant sales periods is obviously an evidentiary matter, but Petitioners' unnecessary pleading of *one* generally known method of determining the market value for gas, somehow caused the court below to completely misperceive and misconstrue Petitioners' claim. We do not claim that the one manner Petitioners' suggested is the only manner of determining market value. Nor that the Secretary should violate regulations.

By regulation, the Secretary assumed the sole and exclusive right (as trustee) to determine the sale value of the Indians' gas. If the method used by the Secretary produced substantially less than true market value, the United States is liable for the short-fall.

The Circuit Court misapplied this Court's statement that the statutes and regulations "established the contours of the United States fiduciary responsibilities." (463 U.S. at p. 224.)

---

[7] In both *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390 (Ct. Cl. 1975) and *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973), the *statutes permitted* Indian funds to be held in the Treasury at 4% interest, which the Government did. Therefore no statutory violation could be alleged, but the United States was liable because of its failure to invest the monies in other ways which would have produced more income for the Indians. That statute, as do the regulations in the case at bar, establishes a floor, not a ceiling. Those cases were cited with approval in *Mitchell II* (103 S.Ct. at p. 2973, fn. 13).

Webster's Third New International Dictionary (1961) defines "contour", *inter alia*; "to surround, *sketch in, outline* . . .". The Court below held that a complaint must allege that a specific statute or specific regulation was violated by the Government before a valid claim for relief for breach of fiduciary obligations was stated.

But as we understand *Mitchell II*, the statutes and regulations merely "define the contours of the United States' fiduciary responsibilities". They sketch in the outline, or define the subject matter of the fiduciary responsibility. Here, the Government as trustee, assumed the exclusive right and duty to determine the "value" of the Indians' gas. Having taken on that fiduciary obligation, it is liable, and a claim upon which relief can be granted is stated, when it is alleged (even inartfully) that the obligation is breached. Selling Indians' gas for less than its market value is a breach of a fiduciary's duties.

Moreover, as this Court held more than thirty years ago in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 102 (1957):

> ". . . In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. (Footnote citations omitted) . . . ."

II. ALTERNATIVELY, IT IS AN ABUSE OF DISCRETION TO DENY A REQUEST TO AMEND A COMPLAINT WHEN AN ORDER IS ENTERED THAT THE COMPLAINT DOES NOT STATE A CLAIM.

Petitioners' position is that, under *Mitchell II* and other supporting authority that the Complaint did in law state a claim upon which relief could be granted.

More than twenty-five years ago, this Court aptly admonished lower courts:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'Federal Rules reject the approach that pleading is a game of skill in which *one misstep* by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' (citation) . . ." *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227 at p. 230 (1962).

But be that as it may, the Appellate Court committed reversible error, and abused its discretion, by failing to remand the case to the Claims Court with leave to amend the Complaint as Petitioners requested. There can be no reasonable argument but that a claim for relief can be more articulately stated. Either the Secretary breached his fiduciary responsibilities by:

1. Abusing his discretion under the regulations to properly determine true market value, or;

2. Failing to use the tools Congress provided to obtain the "highest obtainable economic royalty" in the best interest of the Indians.[8]

In Petitioners' Petition for Rehearing, as an alternative to reversing the Circuit Court's decision outright, Petitioners requested that Court to remand the case to the Claims Court with leave to amend the complaint. That was the first time such a request could have been made. It was denied.

Although the case had been pending for more than four (4) years, it was not until the Circuit Court entered its appellate decision had there been any ruling that Petitioners' Trial Court Complaint failed to state a claim upon which relief could be granted. Petitioners were never allowed an opportunity to amend their Com-

---

[8] *Hallam v. Commerce Mining & Royalty Co.*, 49 F.2d 103, 109 (10 Cir., 1931) *cert. den.*, 284 U.S. 643 (1931).

plaint to cure the perceived defect, nor did the Circuit Court ever state any reason why Petitioners' request was denied.

According to *Foman v. Davis*, 33 S.Ct. at p. 230:

> ". . . Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reasons appearing for the denial is not an exercise of discretion: it is merely *abuse of discretion* and inconsistent with the Federal Rules.
>
> The judgment is reversed . . ."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and decision of the Circuit Court, and that judgment and decision should be reversed.

Simply put, there should be no difference between the Government's sale of an Indians' log for less than its market value, than its sale of an Indians' natural gas for less than its market value. Timber is replenishable—natural gas is not.

In the alternative, the judgment and decision should be reversed with instructions to remand the case to the Claims Court with instructions to permit amendment of the Complaint.

Respectfully submitted,

HARVEY L. HARMON, SR.
(Counsel of Record)
KORNFELD, FRANKLIN & PHILLIPS
301 N.W. 63rd Street
Suite 600
Oklahoma City, OK 73116
(405) 840-2731
Attorney for Petitioners

February 5, 1988

APPENDIX

INDEX TO APPENDIX

Page

Opinion of the United States Court of Appeals for the Federal Circuit filed September 28, 1987 ..... 1a-10a

Order of Federal Circuit Court of Appeals denying rehearing in banc filed November 25, 1987 ..... 11a

Order of Federal Circuit Court of Appeals denying rehearing filed November 10, 1987 ..... 12a

Judgment of the U.S. Court of Appeals for the Federal Circuit filed September 28, 1987 ..... 13a

Judgment of the United States Claims Court filed November 4, 1986 ..... 14a

Memorandum Order of the United States Claims Court filed October 31, 1986 ..... 15a-23a

Order of United States District Court for the Western District of Oklahoma filed January 16, 1985 ..... 24a-27a

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1131

FREEMAN PAWNEE, WILLIAM L. PAWNEE, JR., MICHAEL J. PAWNEE, GREGORY PAWNEE, LISA J. PAWNEE, MURIEL LITTLECALF, EVELYN STANTON GARDNER, individually, and on behalf of all others similarly situated,

Plaintiff-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

Appealed from: U.S. Claims Court
Judge Mayer

Decided: September 28, 1987

Harvey L. Harmon, Sr., Kornfeld, Franklin & Phillips, of Oklahoma City, Oklahoma, argued for appellant. With him on the brief was *Charles R. Underwood.*

Martin W. Matzen, Department of Justice, of Washington, D.C., argued for appellee. With him on the brief were *F. Henry Habicht, II*, Assistant Attorney General, *Robert L. Klarquist* and *Pamela S. West.* Also on the brief was *Thornton W. Field* and *Peter Schaumberg*, Office of the Solicitor, Department of the Interior, Washington, D.C., of counsel.

Henry J. Sockbeson and *Arlinda F. Locklear*, Native American Rights Fund, of Washington, D.C., were on the brief for Amicus Curiae. Also on the brief for Amicus Curiae were *Robert M. Peregoy* and *Steven C. Moore*, Native American Rights Fund, of Boulder, Colorado.

Before DAVIS, *Circuit Judge*, BENNETT and MILLER, *Senior Circuit Judges*.

DAVIS, *Circuit Judge*.

The underlying suit (transferred to the Claims Court from the District Court for the Western District of Oklahoma) was brought against the United States by Indians whose restricted Indian predecessors entered into oil and gas (primarily gas) leases on mining land (administered by the Interior Department) with oil companies; the action is for alleged violations of fiduciary duties by Interior in collecting royalties on those leases. The Claims Court held primarily that Interior had no fiduciary obligations toward the plaintiffs-appellants and accordingly dismissed for lack of jurisdiction. *Pawnee, et al. v. United States*, No. 53-85L (Cl. Ct., Oct. 31, 1986). We affirm the dismissal on the separate ground that plaintiffs have not stated a proper claim for fiduciary breaches.

I.

FACTS AND PROCEEDINGS

Plaintiffs are successors in interest of restricted Indians (themselves successors in interest of allottees of the Cheyenne-Arapaho Tribe) who now are beneficial owners of some mineral acreage in Oklahoma. The United States holds legal title to this land in trust for the plaintiffs. The beneficial owners' predecessors in interest, with the consent and approval of the then Secretary of the Interior, entered into two oil and gas mining leases of this mining land with oil companies which ex-

ploited and sold those commodities. One lease was made in 1957 and the other in 1963. Those leases provided that the Secretary will collect royalties on behalf of plaintiffs from the lessees. Plaintiffs say that the United States owes them an unfulfilled fiduciary obligation that they receive gas royalties computed on a market value determined by the average of the three highest prices paid for like quality gas at the time and the county of jurisdiction. An accounting was sought and damages asked of not less than $1,000,000 for the individual plaintiffs, and $500,000,000 for the class of which plaintiffs are members.[1] The United States denied all liability, the Claims Court directed the parties to file a motion regarding "jurisdiction," and the United States moved to dismiss for lack of subject matter jurisdiction, to which plaintiffs responded.

As we have said, the Claims Court granted that motion on the ground that the United States had no fiduciary obligation toward these plaintiff Indians with respect to the leases involved.

II.

ISSUES.

The issues are whether

(1) the United States, through the Secretary of the Interior, owes fiduciary obligations to appellant-Indians with respect to the making and administration of the leases and the collection and payment of royalties on the Indians' mineral lands leased for oil and gas purposes;

(2) if so, whether the complaint delineates a proper case for breach of that fiduciary obligation?

[1] The complaint in the Claims Court also asserts that this action is brought on behalf of all the Indians similarly situated whose lands have been similarly leased.

III.

FIDUCIARY RELATIONSHIP.

First, we reject the Claims Court's broad denial of any general fiduciary relationship between appellant Indians and the Department of the Interior.

A. On that question, we start with the so-called Indian Long-Term Leasing Act, 25 U.S.C. § 396, first enacted in 1909, which declares in pertinent part:

> All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may be said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect . . . . The Secretary of the Interior shall have the right to reject all bids whenever in his judgment the interests of the Indians will be served by so doing, and to readvertise such lease for sale.

This statute places the Secretary of the Interior at the center of the leasing of Indian mineral lands. He determines whether to consent to a lease and the terms of the lease; he performs "any and all acts" necessary to carry out the statute "into full force and effect"; and he makes such rules and regulations as may be necessary to carry out the legislation.[2]

---

[2] The legislative history of the 1909 Act supports the view that Congress was much interested in having Interior oversee the leasing of the Indian lands so as to prevent exploitation of and prejudice to the Indians' interest, or injustice to them. H.R. Rep. No. 1225, 60th Cong., 1st Sess. at 1-2 (1908).

In 1925, Interior issued regulations under 25 U.S.C. § 396, *supra*, which required Interior approval of leases and called upon the

In 1982, the Federal Oil and Gas Royalty Management Act, 30 U.S.C. §§ 1701-57, was enacted. This statute covered both tribal and allotted Indian lands (as well as other government land). Among the expressed statutory purposes were (§ 1701(b)(4)) "to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources;" and (§ 1701(b)(5)) "to effectively utilize the capabilities of the States and Indian tribes in developing and maintaining an efficient and effective Federal royalty management system." The Congressional findings, embodied in the Act, declare (§ 1701(a)(4)) that "the Secretary should aggressively carry out his trust responsibility in the administration of Indian oil and gas." [3] There were, for example, specific provisions on royalty payments to Indians. §§ 1714, 1715.

There is doubt as to which of the current Interior regulations applied (in other forms) before passage of the 1982 Act, but there is no doubt that these current regula-

---

departmental "inspector" to consult with the department "for protecting the property of the [Indian] lessor and securing compliance with the provisions of this regulation."

[3] The statute's legislative history declares (among other purposes) that the Act's purpose is "to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources . . . ." H.R. Rep. No. 859, 97th Cong., 1st Sess. 15, *reprinted in* 1982 U.S. Code Cong. & Admin. News 4268.

The legislative history also includes the report of the Linowes Commission which was previously established to study accountability for receipts from federal Indian oil and gas. The Commission's report (issued in 1982) stated that "the Federal Government has a special responsibility as trustee for proper management of Indian natural resources." Commission Report, p. 6. The Report listed (in an Appendix) the various "trust responsibilities" of the Bureau of Indian Affairs "with respect to the development and production of Indian minerals held in trust or in restricted status." These responsibilities included "[c]ollecting, accounting, and distributing bonus and rental income prior to production," as well as "[m]aking distribution of royalty payment after it is transmitted from USGS royalty management office, once production begins."

tions (governing the Bureau of Indian Affairs) deal expressly, *inter alia*, with the maximum royalty rent, minimum rentals and royalties rate, length of the lease, methods of payment of rentals and royalties, 25 C.F.R. §§ 212.4, 212.12, 212.14, 212.16. The regulations pertaining to the Minerals Management Service (successor to the Geological Survey—which formerly had these responsibilities—for these purposes) concern calculation of the value of the oil and gas purchased. 30 C.F.R. Part 206. The Bureau of Land Management is responsibile for the operation of the Indian leases. 43 C.F.R. Part 3160. The total of these regulations is comprehensive, giving wide powers to Interior as to all aspects of the leasing arrangement.[4]

B. From these statutes and regulations we must draw the conclusion, which differs from that of the Claims Court, that the United States has a general fiduciary obligation toward the Indians with respect to the management of those oil and gas leases.[5] This case is very much like *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*, dealing with lumber) in that here the governing statutes and regulations (a) give elaborate powers to Interior with respect to those leases, (b) always call for consideration of the best interests of the Indians, (c) require proceeds of the leases to be given to the Indians and, (d) recognize the existence of a general trust relationship toward the Indians with respect to the oil and gas products of these lands. It is by no means controlling that the statutes fail to say explicitly

---

[4] The then regulations are summarized in *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 372-73 (1968) (dealing with land comparable to that involved here). *Poafpybitty* said that "the United States has exercised its supervisory authority over oil and gas leases in considerable detail" (390 U.S. at 373).

[5] This does *not* mean, as we discuss in Part IV, *infra*, that every Government action disliked by the Indians is automatically a violation of that trust.

that the Indians are entitled to damages if their rights are violated. As *Mitchell II* said (463 U.S. at 226):

> Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breach of trust.

And in *Poafpybitty v. Skelly Oil Co.*, *supra*, 390 U.S. at 373, the Court referred to the Government's "trust obligations" as to these Indian oil-and-gas leases transactions.

In a word, we agree with the in banc Tenth Circuit in *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855 (10th Cir. 1986), adopting for the most part the panel dissenting opinion, 728 F.2d 1555, 1563-73 (10th Cir. 1984), that the United States is a general trustee with respect to Indian leases of this kind (though, of course, we do not consider the precise question before that court).

IV.

A PROPER CLAIM.

That there is such a general fiduciary relationship does *not* mean that any and every claim by the Indian lessor necessarily states a proper claim for breach of the trust —a claim which must be fully tried in the Claims Court. Here, we think that no proper claim has been asserted and that the Claims Court correctly rejected the claims that were asserted.[6]

---

[6] In its opinion, the Claims Court pointed out, as we do *infra*, that the pertinent regulations and leases were fully followed by Interior,

Appellants' complaint states their Count I claim as Interior's failure "to enable them to receive the benefits of gas *royalties computed upon the market value determined by the highest price paid or offered for like quality gas at the time of production*," and their Count II claim is for "the differences between the amount actually collected as gas royalties for plaintiffs' benefit and *the amount which should have been collected for plaintiffs' benefit, based upon market value determined by the average of the three highest prices at the time of and in the county where it was produced*" (emphasis added). The gravamen of this charge is that the Government did not pay them, as royalties, on the basis of the highest market value for the particular type of gas produced by the lessees.

The difficulty with this claim is that it runs counter to the governing regulation and the terms of the leases. The appellants demand royalties based on the highest market price or value at the time and/or place of production, but the governing regulation and the leases expressly restrict the highest price "*for the major portion*" of the gas "produced and sold from the field where the leased lands are situated" (emphasis added). 25 C.F.R. § 212.16 states:

> * * * During the period of supervision, "value" for the purposes of the lease may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production *for the major portion* of the * * * gas * * * produced and sold from the field where the leased lands are situated * * *. *The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary of the In-*

---

and there was no abuse of discretion or arbitrary or capricious action alleged by appellants.

> *terior, be deemed mere evidence of or conclusive evidence of such value.* (Emphasis added.)

The two leases involved in this case precisely follow suit. The reference to highest prices is always linked to "the major portion" of the gas in the field.

There is no allegation that Interior failed to comply with the regulations or the leases in valuing the oil for royalty purposes. There is no statutory provision on that subject and no assertion that any statute has been violated. There is no claim that the leases were imprudently or illegally consummated. There is no suggestion that Interior failed to base royalty payments on all the gas sold by the lessees and the sums paid over by them. Thus, the claim is simply that the Interior Department is compelled to go contrary to and beyond the regulations and the leases in order to fulfill its alleged fiduciary obligation to appellants.

That is a proposition we cannot accept. As shown in Part II, *supra*, the fiduciary relationship springs from the statutes and regulations which "define the contours of the United States' fiduciary responsibilities." *Mitchell II*, *supra*, 463 U.S. at 224. Where, as in this case, the regulations and the leases deal directly with the problem and are not challenged, the Indians cannot demand that the United States ignore those provisions or act contrary to them. The scope and extent of the fiduciary relationship, with respect to this particular matter, is established by the regulation and leases. Appellants cannot create a viable fiduciary claim purely by insisting that this court (or the Claims Court) establish different or higher standards. That is a function solely of Congress or its delegates, not of the courts acting on their own. Interior is not required to go beyond directives and leases which are consistent with the statutes and regulations.

Because appellants have not stated a proper claim for breach of trust, we affirm the judgment of dismissal on the grounds set forth in Part IV of this opinion.[7]

AFFIRMED.

---

[7] Though the Claims Court dismissed for lack of jurisdiction, we uphold that dismissal on the basis of failure to state a proper cause of action, *i.e.*, on the merits. The Claims Court and we both have jurisdiction to decide that no proper claim has been stated. *Ralston Steel Corp. v. United States*, 340 F.2d 663, 667-68 (Ct. Cl. 1965).

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1131

FREEMAN PAWNEE, WILLIAM L. PAWNEE, JR., MICHAEL J. PAWNEE, GREGORY PAWNEE, LISA J. PAWNEE, MURIEL LITTLECALF, EVELYN STANTON GARDNER, individually, and on behalf of all others similarly situated,

Plaintiff-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

A suggestion for rehearing in banc having been been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

Judge Mayer took no part in consideration or decision of this suggestion for rehearing in banc.

FOR THE COURT:

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Date 11/25/87

cc: Mr. Harvey L. Harmon, Sr.
Mr. Henry J. Sockbeson
Mr. Martin W. Matzen, DOJ

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1131

FREEMAN PAWNEE, WILLIAM L. PAWNEE, JR., MICHAEL J. PAWNEE, GREGORY PAWNEE, LISA J. PAWNEE, MURIEL LITTLECALF, EVELYN STANTON GARDNER, individually, and on behalf of all others similarly situated,

Plaintiff-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

Before DAVIS, *Circuit Judge*, BENNETT and MILLER, *Senior Circuit Judges.*

ORDER

A petition for rehearing having been been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for hearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT:

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Date 11/10/87

cc: Mr. Harvey L. Harmon, Sr.
Mr. Henry J. Sockbeson
Mr. Martin W. Matzen, DOJ

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1131

FREEMAN PAWNEE, WILLIAM L. PAWNEE, JR., MICHAEL J. PAWNEE, GREGORY PAWNEE, LISA J. PAWNEE, MURIEL LITTLECALF, EVELYN STANTON GARDNER, individually, and on behalf of all others similarly situated,

Plaintiff-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the U.S. Claims Court in CASE NO(S). 53-85 L.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED.

ENTER BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

DATED Sep. 28, 1987

Issued as a Mandate: Nov. 17, 1987

IN THE UNITED STATES CLAIMS COURT

No. 53-85 L

FREEMAN PAWNEE, WILLIAM L. PAWNEE, JR., MICHAEL J. PAWNEE, GREGORY PAWNEE, LISA J. PAWNEE, MURIEL LITTLECALF, EVELYN STANTON GARDNER, individually, and on behalf of all other similarly situated,

v.

THE UNITED STATES

JUDGMENT

Pursuant to the memorandum order of October 31, 1986, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed for lack of jurisdiction, with costs to the prevailing party.

FRANK T. PEARTREE

Clerk of Court

By: /s/ Debra L. Samber
Deputy Clerk

November 4, 1986

NOTE: As to appeal, 60 days from this date, see FRAP 4(a)

IN THE UNITED STATES CLAIMS COURT

No. 53-85L
(Filed October 31, 1986)

FREEMAN PAWNEE, WILLIAM L. PAWNEE, JR., MICHAEL J. PAWNEE, GREGORY PAWNEE, LISA J. PAWNEE, MURIEL LITTLECALF, EVELYN STANTON GARDNER, individually, and on behalf of all other similarly situated,

Plaintiffs,

v.

THE UNITED STATES,

Defendants.

MEMORANDUM ORDER

This case is here on transfer from the United States District Court for the Western District of Okalohma. Plaintiffs are successors in interest to restricted Indians, themselves successors in interest to allottees of the Cheyenne-Arapahoe Tribe of Indians. They are the beneficial owners of, and defendant holds title in trust to, mineral acreage in Canadian County Oklahoma. Plaintiffs' predecessors in interest, with the consent and approval of the Secretary of the Interior, entered into oil and gas mining leases with oil companies, one in 1957, the other in 1963, which provide that defendant will collect royalties on their behalf from the lessees. The royalties are a percentage of the value of the gas at the time production.

Plaintiffs allege that defendant owes a fiduciary obligation to ensure that they receive gas royalties computed on a market value determined by the average of the three highest prices paid for like quality gas at the time and in the county of production. They say defendant has

failed to collect royalties on this basis and thereby breached its fiduciary obligation. They seek $1,000,000 for themselves, and $500,000,000 for the class they purport to represent and have moved to certify. Defendant denies both the existence and breach of a fiduciary relationship, and moves to dismiss for lack of subject matter jurisdiction.

Subject matter jurisdiction may be established in this court by demonstrating that there has been a waiver of sovereign immunity, and that there is a separate source of law which " 'can fairly be interpreted as mandating compensation by the Federal government for the damages sustained.' " *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206, 216 (1983), quoting *United States v. Testan*, 424 U.S. 392, 400 (1976). The Tucker Act, 28 U.S.C. § 1491, is a waiver of sovereign immunity for matters within its coverage. After initial dispute, the parties agree that sovereign immunity has been waived, but disagree over whether the statutes and regulations at issue here create monetary liability.

Plaintiffs rely principally on 25 U.S.C. § 396, the Indian Long-Term Leasing Act, which in pertinent part says,

> All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect. . . .

Close reading of this statute shows that defendant, through the Secretary of the Interior, has limited involvement in the leasing of allotted lands for mining purposes. There is no suggestion that failure to comply with the

statute, which in any event plaintiffs do not allege, results in compensation for damages. *See Mitchell II*, 463 U.S. at 227. This is confirmed by the absence of any congressional intention in the legislative history that defendant respond in damages. *See* H.R. Rep. No. 1093; Conf. Rep. No. 1562, 84th Cong., 1st Sess., *reprinted in* 1955 U.S. Code Cong. & Ad. News 2691, 2695. Section 396 does not approach satisfying the requirement that the obligation for money compensation must be clear and strong. *Inupiat Community of the Arctic Slope v. United States*, 680 F.2d 122, 130 (Ct. Cl. 1982).

Likewise, none of the other substantive statutes plaintiffs cite in their second amended complaint give rise to monetary damages. Codifications of the General Allotment Act, 25 U.S.C. §§ 334 and 348, provide for only a limited trust in favor of Indians. They give plaintiffs no right to recover damages though to flow from defendant's activities involving allotted lands. *United States v. Mitchell (Mitchell I)*, 445 U.S. 535, 546 (1980). Reliance on 25 U.S.C. § 396a is misplaced because it pertains to leases of unallotted lands. And mineral lands and mining laws plaintiffs cite, 30 U.S.C. §§ 181-287 and 351-359, cover all lands for which the federal government has responsibility, not only those of Indians. In any event, they cannot be read as mandating the payment of money damages for noncompliance, as plaintiffs suggest. Cited mining regulations impacting on Indian lands, 25 C.F.R. part 212 and 43 C.F.R. part 3160, also carry no language conducive to mandating money damages for their violation, even if plaintiffs had so alleged.

Nevertheless, plaintiffs argue that beyond their texts, the statutes and regulations in the aggregate give the federal government full responsibility for managing the resources and lands for their benefit. They thereby establish a fiduciary relationship containing all necessary elements of a common law trust. Plaintiffs disclaim any

suggestion that either the statutes and regulations or the leases were breached; indeed, they say they were not. The sole asserted basis for jurisdiction is violation of the fiduciary duty to collect the highest royalties obtainable, arising out of the "pervasive role" and "elaborate control" defendant has assumed over the management and sale of their assets because of those statutes and regulations.

Contrary to plaintiffs' view, however, *Mitchell II* does not say that a fiduciary relationship exists whenever the federal government is involved in the management of Indian resources. It evolves from the intent of Congress evidenced by statutory authorization for the activity at issue. *Mitchell II* found that Congress statutorily gave the Secretary of the Interior complete authority to manage Indian timber. He decides how to maximize its production, provide for its sale, and collect the receipts, and determines whether to turn the funds over to the Indians or use the money for some other purpose beneficial to them. The Secretary may also deduct administrative fees for his services from the timber revenues before paying the allottees. 463 U.S. at 222-23.

Our case is different. Here, the allottees lease their own minerals rights. "Although the approval of the Secretary is required, he is not the lessor and he cannot grant the lease on his own authority." *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 372 (1968). No statute speaks to the needs and best interests of the Indian owners, nor does the Secretary deduct a fee for his participation or determine how the proceeds should be used. He collects royalties from the lessees according to a regulatory formula also reflected in the lease, and pays the money over to the allottees. The secretarial role is minimal.

The regulations covering these allotted lands lend no support to plaintiffs' claims. Part 212 of 25 C.F.R. merely provides for the orderly administration of mining leases and activities on allotted lands. It does not manifest the

pervasive government involvement in the management of the resource that *Mitchell II* found in timberlands. Part 3160 of 43 C.F.R. is even less helpful. It sets out rules "to promote the orderly and efficient exploration, development and production of oil and gas," 43 C.F.R. § 3160.0-4, and covers "all operations conducted on or for the benefit of a federal or Indian oil and gas lease . . .," *id.* § 3161.1. By these regulations, defendant has incurred no obligation special to plaintiffs; it has set up a comprehensive scheme to oversee federal onshore oil and gas operations in the public interest. The regulations look to proper use of the resources, to "technical, safety, and environmental factors involved with drilling and producing oil and gas on Federal and Indian oil and gas leases," *id.* pt. 3160, note 1, not to the pecuniary interests of either lessees or lessors.

Cape Fox Corp. v. United States, 4 Cl. Ct. 223 (1983), considered a claim for money damages by an Alaskan native group on grounds similar to those pleaded here. In that case, the Department of Agriculture had granted a timber contract on federal lands in Alaska. Plaintiff, a native corporation formed pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 *et seq.*, selected the lands under contract in settlement of aboriginal claims as permitted by the Act. Thereafter, the Department extended the timber contract, and the receipts were escrowed and eventually disbursed to plaintiff as provided by ANCSA. Plaintiff argued that more would have been received had the timber contract not been extended, and demanded the difference. It claimed that defendant had failed to perform its fiduciary duty in the management of the timber resources. As here, defendant contested jurisdiction.

The court held that because jurisdiction over claims for breach of fiduciary duty must be founded on "a statute or regulation that mandates payment of money," the mere existence of the general trust relationship does not estab-

lish the scope of the government's obligations. 4 Cl. Ct. at 230. "[W]here the money claim or the alleged fiduciary duty stems from a statute or regulation, such statute or regulation must be capable of being fairly interpreted as mandating compensation by the Federal Government for the damages sustained. The substantive right to money need not be explicitly stated but the obligation for money compensation must be clear and strong." *Id.* at 232.

ANCSA authorized defendant to manage national forest lands after selection but before conveyance to plaintiff; proceeds were deposited in escrow to be paid to the native corporation upon conveyance, with interest; and it was congressional policy that natives be accorded maximum participation in decisions affecting their rights in the property. Notwithstanding, *Cape Fox* concluded "[t]here is no indication that Congress in its enactment of ANCSA intended a fiduciary relationship." *Id.* at 233. Nothing in the statute or its history signified that intent, and the contract extensions had been completed in accordance with government policies and regulations.

The allegation here is much the same, that defendant collected and paid over royalties representing less than a maximum return. But this is an even stronger case for defendant. While in *Cape Fox* it had a statutory obligation not only to escrow and pay over the receipts to plaintiff, but to manage the resource, no similar obligation exists here. The lands in both cases were subject to federal regulation, but *Cape Fox* found no violations, and none are even alleged here. Indeed, far from claiming violations of any statutes or regulations, wastage or loss of assets, or the wrongful extraction and sale of resources, plaintiffs' only complaint is that defendant has failed to collect as much in royalties as it might have.

Although they deny they are asking for recoupment of royalty deficiencies, only that their damages be calculated as the difference between the royalty collected by defendant and the royalty which they believe should have

been collected, this disclaimer fails. They are looking to recover royalty deficiencies which are properly collectible from the lessees under the existing leases, if at all. Plaintiffs have contractual relationships with their lessees, and have every right to bring an action against them for underpayment of royalties. *Poafphybitty*, 390 U.S. at 374.

Plaintiffs have established no authority to impose a greater duty on defendant, even after the court afforded them an additional opportunity to brief the issue after oral argument. The leases and regulation say "value" of gas "may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered . . . at the time of production for the major portion of the . . . gas produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances. . . . The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary of the Interior, be deemed mere evidence of or conclusive evidence of such value." 25 C.F.R. § 212.16. Defendant has apparently determined value as the price received by the lessees, and plaintiffs do not suggest an abuse of discretion, or arbitrary or capricious action. The sole source of plaintiffs' formulation of value is the posited fiduciary duty. Because of that duty plaintiffs would have defendant supercede both the leases and the regulation, and calculate the royalties differently for a higher return for the years the leases have been in effect.

For the court to adopt this expansive theory there must be clear authority from which the fiduciary duty might be derived. The lesson of the *Mitchell* cases is that it must be grounded on a clear and specific statutory base, or on regulations if in conformity with the statutes. But the rubric "fiduciary" is not helpful absent that predicate. Only when Congress manifests its intent that

a fiduciary duty be imposed may this court respond to plaintiffs' demand for monetary damages. To do otherwise would be to usurp the plenary authority over Indian matters reserved to Congress.

Plaintiffs tell us that at a hearing before this case was transferred the district court wondered, "Why would there be any distinction between selling a log and selling a barrel of oil?", apparently an allusion to the supposed similarity between this case and *Mitchell II*. The distinction has nothing to do with the commodities, and everything to do with Congress' treatment of them. While *Mitchell II* demonstrated how Congress specifically directed defendant comprehensively to manage timber operations on Indian lands and for their benefit, our scheme reflects the opposite approach. Congress let the allottees manage their own lands, with minimal involvement by the government.

The court is not persuaded by the declaratory judgment approved by the Tenth Circuit upon rehearing *en banc* in *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855 (1986); 728 F.2d 1555 (1984), that defendant has a fiduciary duty akin to what plaintiffs urge here. First of all, contrary to our district court's view that this court "may now grant equitable relief as an incident to the award of money," citing 28 U.S.C. § 1491 (a)(3), there is no general authority to issue a declaratory judgment. That power is limited to contract cases fitting under section 1491(a)(3), which this case does not. *See, e.g., Eagle Construction Corp. v. United States*, 4 Cl. Ct. 470, 475 (1984). *Jicarilla* also dealt with an Indian tribe's suit against their lessees, and involved statutes and regulations different from those upon which the individual allottees rely here.

Even so, *Jicarilla's* conclusory analysis purportedly analogous to the approach in *Mitchell II* is no more persuasive than plaintiffs' effort here. The court constructed a trust obligation which superceded the Secretary's ap-

parent discretion in calculating royalties under the leases and regulations, and concluded his only duty was to maximize immediate royalty revenues. But in this court's view, there must be clear congressional authorization, absent here, for substituting a new obligation for the provisions of the leases agreed to by the parties, and the regulations. "It would not seem enough to pick up quotations from a variety of cases, and to apply them in this case regardless of context. There is no overall, all pervading 'fiduciary duty' to [plaintiffs]. It has to have its origin in some statute relating to the subject matter and applicable to the particular situation. This is what *United States v. Mitchell* [*I* and *II*] teach. That is, there must be a statutory basis for the duty and a clear one. . . ." *Jicarilla*, 782 F.2d at 858 (Seth, J., dissenting).

Accordingly, it is ORDERED that defendant's motion to dismiss is GRANTED, and the complaint will be DISMISSED for lack of jurisdiction.

/s/ H. Robert Mayer
H. ROBERT MAYER
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-2199-BT

FREEMAN PAWNEE, *et al.*,
Plaintiffs,

v.

WILLIAM P. CLARK, Secretary of the Interior,
and THE UNITED STATES OF AMERICA,
Defendants.

[Filed Jan. 16, 1985]

ORDER

This matter comes before the Court on defendants' motion to dismiss for lack of subject matter jurisdiction, filed pursuant to F.R.Civ.P. 12(b)(1). Plaintiffs have objected to the motion. For the reasons set forth below, the Court concludes subject matter jurisdiction is lacking; however, the case will be transferred to the United States Claims Court rather than dismissed.

This is an action for alleged breach of fiduciary duty against the United States Secretary of the Interior and the United States. Plaintiffs are heirs at law and successors in interest to White Buffalo, a restricted Indian. They are beneficial owners of, and defendant United States of America, holds title in trust to, 160 acres of minerals in Canadian County, Oklahoma. In 1963, White Buffalo, plaintiffs' predecessor in interest, with the consent and approval of the then Secretary of Interior, entered into an oil and gas lease of the lands. That lease is still in effect.

Plaintiffs contend the Secretary of Interior and the United States owe a fiduciary duty to plaintiffs to affirmatively act for their benefit to insure that they receive from production the highest present price paid or offered for gas sold from the field, at the time of production in the area. Plaintiffs allege they have made demand upon the Secretary, but the Secretary has refused to so act. Thus, they allege, the Secretary and the United States have breached their fiduciary duty to plaintiffs.

Plaintiffs' first claim for relief is for a declaratory judgment that defendants have breached their fiduciary obligations and for an accounting. Plaintiffs' second claim for relief is for damages in a minimum amount of $1 million and maximum amount of $200 million, for defendants' past failure to discharge their fiduciary responsibilities to obtain the highest price paid or offered for gas.

Plaintiffs also seek class certification of themselves and all other restricted Indians owning beneficial interests in mineral lands located in Oklahoma whose mineral interest are producing gas under leases approved by the Department of Interior and gas royalties thereunder which are being collected by the Secretary of Interior for the benefit of the trusted Indians.

Defendants have filed a motion to dismiss for lack of subject matter jurisdiction on the basis of sovereign immunity, urging that where the United States does not consent to suit, the United States Claims Court has exclusive jurisdiction over claims in excess of $10,000.

Federal district courts and the Claims Court have concurrent jurisdiction of claims against the United States not exceeding $10,000. The Claims Court has exclusive jurisdiction over claims in excess of $10,000. 28 U.S.C. § 1346(a)(2). Plaintiffs admit there has been no waiver of sovereign immunity and concede the relief sought in the second claim of the amended complaint, if granted,

would exceed $10,000. Nevertheless, plaintiffs contend the Court should hear and determine the first claim for declaratory relief before transferring the case to the Claims Court for determination of the second claim.

Plaintiffs argue jurisdiction of the action is based in part on the limited waiver of the Administrative Procedure Act in 5 U.S.C. § 702, which provides:

> "A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof. An action . . . seeking relief other than money damages . . . shall not be dismissed . . . on the ground that it is against the United States."

The Court agrees that the limited waiver would confer jurisdiction of the first claim upon this Court were that claim standing alone. However, the Tenth Circuit Court of Appeals has recently held that where the "prime objective" or "essential purpose" of the plaintiffs is to obtain money from the federal government in an amount in excess of $10,000, the Claims Court's exclusive jurisdiction is triggered. *State of New Mexico v. Donald T. Regan*, Slip Opinion No. 83-1981 (October 9, 1984). In that case, the State of New Mexico filed suit in federal district court in New Mexico, challenging the United States' practice of imposing the windfall profits tax on federal royalties before calculating states' 50% share of the royalties. The state sought to recover 50% of the federal royalties used to pay the windfall profits tax, an accounting, declaratory relief, and attorney fees. The federal district court granted summary judgment in favor of the state. Upon appeal, the Tenth Circuit held the suit was primarily one for money damages and the Claims Court had exclusive jurisdiction of it. In so ruling, the Court stated:

> ". . . [T]he Claims Court's exclusive jurisdiction may not be avoided by framing a complaint in the district court as one seeking injunctive, declaratory,

> or mandatory relief when, in reality, the thrust of the suit is one seeking money from the United States."

Id. at p. 8.

This case is similar to the recently-decided Tenth Circuit case. Plaintiffs seek damages from the United States in an unspecified amount in the range of $1 million to $200 million for defendants' past failure to collect royalties based upon market value. Plaintiffs also seek an accounting and declaratory judgment that defendants are breaching fiduciary obligations to plaintiffs. However, as in *State of New Mexico v. Donald T. Regan*, the thrust of the lawsuit is one for damages against the United States in excess of $10,000; thus, the Claims Court has exclusive jurisdiction.

Plaintiffs argue the Claims Court will not have jurisdiction of the equitable claims; however, as the Tenth Circuit pointed out in the *State of New Mexico* case, the Claims Court may now grant equitable relief as an incident to the award of money in the interest of justice. *State of New Mexico v. Donald T. Regan, supra*, at p. 9; 28 U.S.C. § 1491(a)(3). Moreover, since the action is primarily one for damages, the Court does not believe it would be in the interest of public policy or justice for this Court to determine the equitable claim. *See State of New Mexico v. Donald T. Regan, supra*, at pp. 9-10.

Therefore, the Court concludes it lacks subject matter jurisdiction of this action and, pursuant to 28 U.S.C. § 1404(c), hereby orders this case transferred to the United States Claims Court.

ENTERED this 16th day of January, 1985.

/s/ Thomas R. Brett
THOMAS R. BRETT
United States District Judge

Entered in Judgment Docket on 1-16-85